Stogner claim. *Id.* Additionally, because petitioner's innocence claim is one of legal insufficiency and not one of actual innocence, he is not eligible to file a §2241 petition pursuant to the savings clause of §2255. *See Jeffers v. Chandler*, 253 F.3d 827, 830-31 (5th Cir. 2000), *cert. denied* 534 U.S. 1001 (2001). Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT SHOULD NOT HAVE DISMISSED PETITIONER'S PETITION FOR HABEAS CORPUS RELIEF BECAUSE THE LAW CHANGED AFTER HIS FIRST 28 U.S.C. § 2255 MOTION WAS DECIDED AND THE CHANGED LAW MADE HIM ACTUALLY INNOCENT OF THE CRIME FOR WHICH HE WAS CONVICTED.

On April 6, 2001, the district court denied petitioner's first § 2255 motion. *United States v. Krilich*, 163 F. Supp. 2d 943 (2001); see also *United States v. Krilich*, 53 Fed. Appx. 787 (7th Cir. 2002) at 2. Thereafter, on June 26, 2003, this Court decided *Stogner v. California*, 539 U.S. 607 (2003), which held that a statute violates the Ex Post Facto Clause if it revives a statute of limitations that had expired in a criminal case. Petitioner's RICO conviction was predicated on a state statute that had expired in his criminal case. RICO revived the state statute of limitations. *Stogner* held that this application of an expired state statute violates the Ex Post Facto Clause.

Petitioner's § 2241 petition should not have been dismissed because the law changed after his first § 2255 motion which made him actually innocent of the crime for which he was convicted. He had no reasonable opportunity to obtain earlier judicial correction of this fundamental defect in his conviction. In *Stogner*, this Court narrowed the scope of the statute under which he was convicted. The circuit court incorrectly concluded that petitioner was challenging the constitutional validity of his conviction. This is incorrect. While the decision of this Court in *Stogner* may have constitutional consequences (ex post facto ramifications) it did not announce a new rule of constitutional law. As a result, petitioner was convicted of having committed an act that Congress did not intend to criminalize.

Although there were other overt acts of state bribery alleged in the indictment that fell within the applicable state statute of limitations, the jury verdict did not specify which of the five overt acts it unanimously found petitioner had committed. It is well established where at least one of the predicate acts upon which the government relied to prove a "pattern of racketeering activity" is legally insufficient, a RICO conspiracy under 18 U.S.C. § 1962(d) must be overturned. *United States v. Riggiero*, 726 F.2d 913, 921 (2d Cir. 1984); and *United States v. Winter*, 663 F.2d 1120, 1137 (1st Cir.1981). As the court in *Riggiero* explained, "absent some indication by the jury that its determination of guilt rested on two or more predicate acts that are legally sufficient, we are required to reverse the conviction because the legally insufficient predicate act ... may have been necessary to the verdict." *Ruggiero*, 726 F.2d at 921. Accord *United States v. Marcello*, 876 F.2d 1147, 1153 (5th Cir. 1989).

Without the state crime of bribery, there would be no second "predicate act" and thus no "pattern of racketeering activity."

In *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 2002), the court concluded that "[a] federal prisoner should be permitted to seek habeas corpus [§ 2241 relief] only if he has had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion." However, the court added three qualifications to this rule. First, "the change of law has been made retroactive by the Supreme Court." *Id.* Second, the decision establishes a new non-constitutional rule of substantive law which may produce a different result in the case than that dictated by prior law. *Id.* Third, the defendant does not base his claim for relief on the "difference between the law of the circuit in which he was sentenced and the law of the circuit in which he is incarcerated." *Id.* See also *United States v. Prevatte*, 300 F.3d 792, 799-800 (7th Cir. 2002). In deciding the retroactivity issue, the court in *Prevatte* stated: "Rather, the courts have taken the view that a decision of the Supreme Court that gives a federal criminal statute a narrower reading than it previously had been given necessarily raises the possibility that an individual previously convicted under the broader reading now stands convicted of activity that Congress never intended to make criminal." *Id.* at 801-802; see *United States v. Ryan*, 227 F.3d 1058, 1062-1063 (8th Cir. 2000); and *United States v. Tush*, 151 F. Supp. 2d 1246, 149-50 (D. Kan. 2001), aff'd 287 F.3d 1294 (10th Cir. 2002). Since the Supreme Court in *Stogner* narrowed the interpretation of the RICO statute, the decision is retroactive.

Under *Stogner*, it is a violation of the Ex Post Facto Clause to resurrect a statute where the statute of limitations has expired. This is exactly what happened here. The RICO statute merely rewrote the Illinois statute thus requiring petitioner to defend the alleged 1983 state bribe at his 1995 trial. The conduct alleged in the RICO count was the exact same conduct (the 1983 bribe) which occurred after the state statute of limitations had expired. Without the 1983 alleged bribe, petitioner could not have been convicted of the RICO count. There is no way of knowing if the jury relied on this alleged bribe in determining whether petitioner committed the second predicate act required for the conviction.

In this case, nothing has changed. Petitioner has not committed another crime. Instead, he is being held accountable for the exact same conduct which the state legislature determined is no longer criminal. This is expressly prohibited by *Stogner*. To hold otherwise would wholly defeat the purpose of the statute of limitations. The district court incorrectly concluded that *Stogner* was not a substantial change in the law. However, based on *Stogner*, the RICO statute cannot reach conduct where the statute of limitations has expired.

In various circuits, although a defendant cannot be convicted of the crime on direct appeal, the prisoner cannot obtain habeas relief if there is some proof that illegal activities occurred even though there is no way of knowing whether the jury relied on that conduct in determining guilt. See *Kramer v. Olsen*, 347 F. 3d 214 (7th Cir. 2003); *Jeffers v. Chandler*, 253 F.3d 827 (5th Cir. 2001); and *Sawyer v. Holder*, 326 F.3d 1363 (11th

Cir. 2003).[1] In these circuits in order to prove actual innocence, a petitioner must be able to admit everything charged in the indictment and still escape punishment under the statute.

In dismissing this case, the appellate court relied on *Jeffers*. Pet. App. 1a-2a. Under *Jeffers*, as long as there was some proof in the record that the jury could have found petitioner guilty of the crime alleged in the indictment, he cannot qualify for § 2241 relief. However, since the statute of limitations had run on conduct alleged in the indictment, the jury relied on facts that were non-criminal.

II. THERE IS A SPLIT IN THE CIRCUITS OVER WHAT CONSTITUTES "ACTUAL INNOCENCE" AND THERE ARE NO CLEAR RULES FOR DETERMINING WHEN A COURT MAY ENTERTAIN A PETITION FOR § 2241 HABEAS CORPUS RELIEF.

Certiorari should be granted in this case to resolve an important and recurring question of federal habeas corpus law on which the courts of appeals have adopted inconsistent standards: When does a district

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[1] In *Kramer*, the court also seemingly relied on *Cephas v. Nash*, 328 F.3d 98. (2nd Cir. 2003), for the proposition that in order to prove "actual innocence," a petitioner must be able to admit everything charged in the indictment, but still be able to show that any of the conduct proved no longer amounted to a crime. However, in *Cephas* the jury unanimously found the petitioner guilty on enough "predicate violations" to constitute the "continuing series of violations" needed to convict the petitioner. *Cephas*, 328 at 107-108. In other words, the court did not have to speculate that the jury could have found the petitioner guilty based on evidence alleged in the indictment.

court have jurisdiction to entertain a § 2241 petition?

Perhaps Justice Cox best summed up the lack of clarity as to when § 2241 applies. After a lengthy analysis of the legislative history and decisions by other circuits on the scope of § 2241 by his colleagues on the panel, his concurring opinion states in its entirety:

> The majority opinion heroically formulates a general rule to harmonize § 2255's procedural hurdles and its "savings clause." I hesitate to be so bold, however, when the evidence of congressional intent is as sparse as what we have here. I agree that [the inmate's] challenges to his sentence are not cognizable under § 2241. I also agree that the remedy by motion under § 2255 is not rendered "inadequate or ineffective" because an individual is procedurally barred from filing a second or successive § 2255 motion. That's all I need decide in this case, and I therefore would not attempt to formulate a general rule to harmonize the statutory language. *Wofford v. Scott*, 177 F. 3d 1236, 1245 (11th Cir. 2004) (E. R. Cox, concurring).[2]

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[2] Although involving habeas corpus relief under § 2255, in a concurring opinion, Justice Diane P. Wood remarked:

> No one who has been following the law of habeas corpus in the federal courts since 1996 would assume that it is easy for a prisoner - federal or state - to raise a potentially successful claim, even in an initial application. State prisoners seeking to present a petition for habeas corpus relief under 28 U.S.C. § 2254 face a daunting array of procedural requirements that often stump even experienced lawyers.... While the situation of federal prisoners is somewhat different, because they normally must proceed using a motion under 28 U.S.C. § 2255 for collateral relief analogous to habeas corpus, and because

While several circuits have attempted to address when it is proper to bring a § 2241 petition, even in those circuits where the rules are similar, they are anything but uniform. There is a split in the circuits as to whether a court may entertain the type of claim petitioner submitted in his § 2241 petition.

In *Treistman v. United States*, 124 F.3d 361, 377 (2d Cir.1997), the Second Circuit held that a defendant can utilize § 2241 whenever the failure to permit a remedy under § 2255 would "raise serious constitutional questions." See also *Love v. Menifee*, 333 F.3d 69, 73 (2nd Cir. 2003). On the other hand, the Seventh Circuit in *In re Davenport*, 147 F.3d at 611, criticized the *Triestman* rule as "too indefinite" to meet "the needs of practical judicial enforcement." In this case, the district court specifically noted that the there is no clear standard in the First Circuit, the circuit in which this petition was filed, as to when a § 2241 petition may be brought. Pet. App. 20a.

The Fifth Circuit in *Reyes-Requena v. United States*, 243 F.3d 893, 902-03 (5th Cir. 2001), not only noted the split in the circuits, but also pointed out that other circuits have formulated different tests for the savings clause that define when a court may entertain a § 2241 petition. In *Reyes-Requena*, the court stated:

> they are operating within a unitary system, the differences for the most part are only skin - deep. *White v. United States*, 371 F.3d 900, 903 (7th Cir. 2004) (Wood, J., concurring).

The justice, realizing she was operating in the dysfunctional world of habeas corpus, concluded, "In the Alice - Wonderland world of habeas corpus, this was his 'first' § 2255 motion." *Id.* at 905.

To date, the Supreme Court has not provided much guidance as to the factors that must be satisfied for a petitioner to file under habeas corpus provisions such as § 2241. In *United States v. Hayman*, the Court simply observed that habeas corpus writs are available when § 2255 is inadequate or ineffective. See 342 U.S. 205, 223, 72 S. Ct. 263, 96 L. Ed. 232 (1952); see also *Swain v. Pressley*, 430 U.S. 372, 381, 51 L. Ed. 2d 411, 91 S. Ct. 1224 (1977) (stating that the "substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus" in contravention of Article 1, § 9 of the Constitution).

However, a number of our sister circuits have formulated tests for the savings clause. Some have addressed the issue in the context of *Bailey*[3] claims. See *In re Jones*, 226 F.3d 328 (4th Cir. 2000) [ ]; *In re Davenport*, 147 F.3d 605 (7th Cir. 1998) [ ]; *Triestman*, 124 F.3d 361 n.22; *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) [ ]; *In re Dorsainvil*, 119 F.3d 245 (3rd Cir. 1997). [ ] Other circuits have discussed the savings clause in the context of various non-*Bailey* claims. See *Sustache-Rivera v. United States*, 221 F. 3d 8 (1st Cir. 2000) (*Jones* Claim, 18 U.S.C. § 2119) [ ]; *United States v. Lurie*, 207 F.3d 1075 (8th Cir.

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[3] *Bailey v. United States*, 516 U.S. 137 (1997) (defined the meaning of the word "use" for purposes of 18 U.S.C. sec. 924(c)(1), thus narrowing the scope of the statute).

> 2000) (claim under 18 U.S.C. § 1623, false declaration in bankruptcy proceeding) []; *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999) (various sentencing claims). []

In order to qualify for § 2241 relief, the Supreme Court decision must be retroactive. However, it is unclear whether only this Court rather than a lower court can make that determination. *Prevatte*, 300 F. 3d at 800-01.

The resolution of this issue has a far reaching impact on the orderly administration of criminal justice. A § 2241 petition must be filed by the federal prisoner in the federal district of confinement. On the other hand, a § 2255 motion must be filed by the federal prisoner in the federal district in which the defendant was sentenced. Literally hundreds, if not thousands, of cases have been filed in the wrong federal district court under § 2241 that should have been filed under § 2255 and vice versa. A petitioner is required to wade through a quagmire of esoteric decisions to determine where jurisdiction lies in a particular case. There are no definitive rules. This results in an excessive waste of judicial resources and frequently, depending on the circuit, the wrongful summary dismissal of the writ of habeas corpus for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 05-1090

United States Court of Appeals
For the First Circuit

ROBERT KRILICH,
Petitioner, Appellant;

v.

DAVID L. WINN, Defendant, Appellee.

Before Boudin, Chief Judge, Selya and Howard, Circuit Judges.

JUDGMENT

Entered: September 6, 2005

The government's motion for summary disposition is granted. We agree with the district court that the proper forum for petitioner's claims pursuant to *Stogner v. California*, 539 U.S. 607 (2003), is the sentencing court, in this case the United States District Court for the Northern District of Illinois. *See United States v. Barrett*, 178 F. 3d 34, 50 n.10 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000). Because petitioner does not challenge the execution of his sentence, but, rather, challenges the constitutional validity of his conviction, §2255, and not §2241, is the proper vehicle for his Stogner claim. *Id.* Additionally, because petitioner's innocence claim is one of legal insufficiency and not one of actual innocence, he is not eligible to file

a §2241 petition pursuant to the savings clause of §2255. *See Jeffers v. Chandler*, 253 F.3d 827, 830-31 (5th Cir. 2000), cert. denied 534 U.S. 1001 (2001).

Therefore, after careful review of the parties' filings and the record; the government's motion for summary disposition is granted and the judgment of the district court dismissing petitioner's §2241 petition for lack of jurisdiction is summarily affirmed. See 1st Cir. R. 27(c).

By the Court:
Richard Cushing Donovan, Clerk)
By.
Chief Deputy Clerk.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

ROBERT KRILICH

Filed 2/2/95

No. 94 CR 419
Violation of Title 18, USC, Secs. 1962, 1014, and 2; and
Title 26, USC, Sec. 7206

Superseding Indictment

COUNT ONE

The SPECIAL SEPTEMBER 1993 GRAND JURY charges:

1. At times material to these charges:

(a) The City of Oakbrook Terrace was a municipal corporation and a political subdivision of the State of Illinois.

(b)Section 103(b)(4)(A) of the Internal Revenue Code of 1954 permitted municipalities and developers to obtain tax-exempt financing through the issuance of industrial development bonds to fund the development of residential rental projects, in which 20 percent or more

of the units were to be occupied by individuals of low or moderate income.

(c) The Oakbrook Terrace City Council had jurisdiction over legislative and administrative matters relating to the issuance of bonds pursuant to the Industrial Project Revenue Bond Act, Ill. Rev. Stat. (1983), Ch.24 §§11-74-1 to 11-74-14.

(d) Bonds issued pursuant to the Industrial Project Revenue Bond Act, Ill. Rev. Stat. (1983), Ch. 2 4 S§11-74-1 to 11-74-14, were industrial development bonds within the meaning of Section 103 (b) (4) (A) of the Internal Revenue Code of 1954.

(e) The mayor and zoning administrator city engineer for the City of Oakbrook Terrace were employees of the City of Oakbrook Terrace, and had jurisdiction over matters relating to the building and development of real estate located within the corporate environs of the City of Oakbrook Terrace.

(f) Defendant ROBERT KRILICH owned and operated a series of inter-related business entities including Krilich Builders, Krilich Companies Inc., Riverwoods Development, Country Lakes Country Club, Inc., Royce Realty and Management, and Royce Renaissance Investment Corporation ("the Krilich group"). The Krilich group was the developer of a residential real estate project in Oakbrook Terrace known as the "Royce Renaissance" project.

(g) The Krilich group constituted an "enterprise" as that term is used in Title 18, United States Code, Section 1961(4), which engaged in, and the activities of which affected, interstate commerce.

THE RACKETEERING CONSPIRACY

2. Beginning in about 1983, and continuing through approximately June, 1990, at Oakbrook Terrace, Naperville, and elsewhere in the Northern District of Illinois, Eastern Division,

ROBERT KRILICH,

defendant herein, being a person employed by and associated with an enterprise, that is, the Krilich group, which enterprise was engaged in and the activities of which affected interstate commerce, did knowingly combine, conspire, confederate and agree with persons known and unknown to the Grand Jury to conduct and participate, directly and indirectly, in the conduct of the affairs of the Krilich group through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Sections 1961 (1) and 1961 (5).

3. The pattern of racketeering activity consisted of multiple violations of the following federal and state laws

(a) Mail fraud, in violation of Title 18, United States Code, Section 1341.

(b) Acts involving bribery, in violation of Chapter 38, Illinois Revised Statutes, Section 33-1(a) and (b).

4. It was part of the conspiracy that defendant ROBERT KRILICH obtained the issuance of industrial development bonds to fund construction of the Royce Renaissance project by bribery, and paid additional bribes for favorable consideration and support in connection with the bonds and the development of the project.

5. It was further part of the conspiracy that defendant ROBERT KRILICH agreed to pay and did pay bribes

to the mayor of the City of Oakbrook Terrace, Illinois, to obtain the passage of an industrial development bond issue by the city to finance the development of the project.

6. It was further part of the conspiracy that defendant ROBERT KRILICH agreed to pay and did pay a bribe to the mayor of the City of Oakbrook Terrace, Illinois, to obtain, the city's approval of the re-marketing of the industrial development bond which benefited the project.

7. It was further part of the conspiracy that defendant ROBERT KRILICH agreed to pay and did pay bribes to the zoning administrator and city engineer of the City of Oakbrook Terrace, Illinois, concerning the operation of the Krilich group in Oakbrook Terrace.

8. It was further part of the conspiracy that defendant ROBERT KRILICH would and did misrepresent, conceal and hide, and cause to be misrepresented, concealed, and hidden, the purposes of and acts committed in furtherance of the conspiracy.

OVERT ACTS

9. The following overt acts among others were committed in the Northern District of Illinois and elsewhere in furtherance of the conspiracy:

Acts Involving Bribery of the Mayor for Zoning Issues (Chapter 38 , Illinois Revised Statutes, Section 33-1(a) and (b)

10. In or about June, 1983, at Oakbrook Terrace, in the Northern District of Illinois, defendant ROBERT KRILICH knowingly authorized and caused to be paid a bribe to the mayor to obtain his assistance in securing

favorable zoning issues related to the development of the Royce Renaissance Project, namely, obtaining the approval and approving the zoning modification of the Royce Renaissance Project plat ("Exhibit C") to include additional commercial acreage.

Acts Involving Bribery of the Mayor for the Bond Issue and Mail Fraud (Chapter 38, Illinois Revised Statutes, Section 33-1(a) and (b), Title 18, United States Code, Section 1341 .

11. In or about March and April, 1984, defendant ROBERT KRILICH sought to obtain the approval of the city of Oakbrook Terrace, Illinois, to issue industrial development bonds, pursuant to the Illinois Industrial Project Revenue Bond Act, to provide financing to the Krilich group for the development of the Royce Renaissance real estate project in Oakbrook Terrace.

12. In or about April, 1985, the mayor of Oakbrook Terrace, Illinois, solicited a bribe in the amount of approximately $40,000 in return for his assistance in obtaining the approval of the city to issue these bonds.

13. In or about June, 1985, defendant ROBERT KRILICH, and an agent of the Krilich group agreed upon a scheme under which one of the mayor's sons would be declared the "winner" of a staged hole- in-one golf contest in which the prize would be an antique 1931 Cadillac automobile or the cash equivalent of $40,000. The defendant agreed with the mayor, his son and others to use the hole-in-one event to disguise and conceal this bribe to the mayor, which was made in return for the mayor's support on the bond issue to benefit the Krilich group's development of Royce Renaissance.

14. In or about June 10, 1985, defendant ROBERT KRILICH, for the purpose of funding a bribe to the mayor to further the goals of the enterprise, sponsored a hole-in-one golf contest and applied for hole-in-one insurance through the National Hole-In-One Association of Dallas, Texas.

15. The National Hole-In-One Association of Dallas, Texas, in return for a premium of approximately $1,064, insured defendant ROBERT KRILICH, as owner of Country Lakes Golf Course and supplier of the contest prize, and agreed to reimburse the defendant in the event that the hole in-one contest was won by one of the participants.

16. Defendant ROBERT KRILICH, by obtaining this insurance policy, was able to fund a $40,000 bribe to the mayor with funds other than his own or those of the Krilich group.

17 . In furtherance of the scheme, on or about June 19, 1985, defendant ROBERT KRILICH, employees of the Krilich group, the mayor and the mayor's son attended a golf outing sponsored by defendant ROBERT KRILICH at Krilich's golf course, the Country Lakes Golf Club, which was also known as Country Lakes Country Club, Inc., in Naperville, Illinois.

18. On or about June 19, 1985, defendant ROBERT KRILICH, the mayor's son, and employees of the Krilich group falsely claimed that the mayor's son scored a hole-in-one, thereby "winning" the 1931 Cadillac prize or its cash equivalent.

19. On or about June 19, 1985, the mayor and his son elected to receive the antique 1931 Cadillac automobile as the prize for the staged golf contest.

20. Thereafter, defendant ROBERT KRILICH caused the 1931 Cadillac automobile to be delivered to the

mayor's son to ensure passage of the bond issue by the city of Oakbrook Terrace.

21. After the delivery of the automobile, the mayor communicated to an agent of the Krilich group that he no longer wanted the automobile, but instead wanted the $ 40,000. Thereafter, defendant ROBERT KRILICH agreed to take back the antique Cadillac and pay the $40, 000 cash equivalent to the mayor's son.

22. On or about August 27, 1985, the Oakbrook Terrace City Council, pursuant to the Illinois Industrial Project Revenue Bond Act, authorized the issuance of an industrial development bonds which became known as City of Oakbrook Terrace, Illinois Multi-Family Housing Mortgage Revenue Bonds, (Renaissance Project), 1985 Series A, to provide financing to the Krilich group for the development of multi-family housing units known as the Royce Renaissance Development in that municipality, herein after referred to as Oakbrook Terrace Bonds.

23. On or about November 13, 1985, in the Northern District of Illinois, defendant ROBERT KRILICH, for the purpose of defrauding the National Hole-In-One Association of $40,000 to fund a bribe to the mayor, did knowingly cause to be deposited in an authorized depository for mail, to be sent and delivered by the United States Postal Service, an envelope containing documents to support a fraudulent claim for reimbursement in the amount of $40,000 addressed to the National Hole-in-One Association, 728 Campbell Centre, Dallas, Texas 75206.

24. On or about November-22, 1985, in the Northern District of Illinois, and elsewhere, defendant ROBERT KRILICH, for the purpose of defrauding the National Hole-In-One Association of $40,000 to fund a bribe to the mayor, did knowingly cause to be deposited in an

authorized depository for mail, to be sent and delivered by the United States Postal Service, an envelope containing a letter and draft in the amount of $40, 000 addressed to Hal Walker, Country Does Village Golf Club, 5 South 100 Fairway Drive, Naperville, Il 60540.

25. On or about December 31, 1985, the city issued $135 million in Oakbrook Terrace Bonds.

26. Thereafter, on or about January 6, 1986, defendant ROBERT KRILICH caused a check in the amount of $40,000 to be issued to the mayor's son as payee.

Acts Involving Bribery of Mayor for Bond Roll-overs (Chapter Illinois Revised Statutes, Section 33-1 (a) and (b.)).

27. Beginning in or about 1986, and continuing through 1989, at Oakbrook Terrace and elsewhere in the Northern District of Illinois, defendant ROBERT KRILICH knowingly authorized and caused to be paid bribes to the mayor to obtain his assistance in securing the periodic roll-over of the industrial development bonds which were issued in connection with Krilich s development of the Royce Renaissance Project.

Acts Involving Bribery of Mayor for Re-Marketing (Chapter 38, Illinois Revised Statutes, Section 33-1(a) and (b)

28. In or about January 1989, the Oakbrook Terrace Bonds which financed the Krilich group's Royce Renaissance development were due to be re-marketed.

29. On or about January 26, 1989, the city council of Oakbrook Terrace voted not to approve the re-marketing of the bond issue.

30. On or about January 26, 1989, the mayor met with an agent of the Krilich group and demanded approximately $25,000 to obtain the city's approval of the re-marketing of the bond issue.

31. On or about January 30, 1989, defendant ROBERT KRILICH authorized the payment of $25,000 to the mayor to obtain the city's approval of the re-marketing of the bond issue.

32. On or about January 30, 1989, an agent, of the Krilich group delivered approximately $25,000 in United States Currency to the mayor for the purpose of obtaining the city's approval of the re-marketing of the bond issue.

33. On or about February 1, 1989, the mayor signed the bond issue re-marketing agreement on behalf of the City of Oakbrook Terrace.

Bribery of Zoning Administrator (Chapter 38, Illinois Revised Statutes, Section 33-1(a) and (b)).

34. Beginning in or about 1988, and continuing through approximately March, 1990, at Oakbrook Terrace and elsewhere in the Northern District of Illinois, defendant ROBERT KRILICH knowingly authorized and caused to be paid bribes to the zoning administrator/ city engineer of Oakbrook Terrace with the intent to influence the performance of acts related to his employment and function as a public officer, in connection with matters related to the Royce Renaissance Project, including matters related to the United States Environmental Protection Agency and United States Army Corps of Engineers.

In violation of Title 18, United States Code, Section 1962 (d).

No. 94 CR 419

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

ROBERT KRILICH

Filed 9/14/95

VERDICT FORM FOR ROBERT R. KRILICH

Count One

we, the jury, find defendant Robert R. Krilich:

x guilty

Count Two

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Three

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Four

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Five

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Six

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Seven

We, the jury find the defendant Robert R. Krilich

x guilty

Count Eight

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Nine

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Ten

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Eleven

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Twelve

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Thirteen

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Fourteen

We, the jury, find the defendant Robert R. Krilich

x guilty

Count Fifteen

We, the jury, find the defendant Robert R. Krilich

x guilty

CIVIL ACTION
04-40111-DPW
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT KRILICH, SR.,
Petitioner,
v.
WARDEN DAVID WINN,
Respondent.

December 20, 2004

MEMORANDUM AND ORDER

In this habeas corpus proceeding, petitioner, who has collaterally attacked his judgment unsuccessfully under 28 U.S.C. § 2255 in the Northern District of Illinois, contends that, because § 2255 is no longer effectively available to him, he is entitled to renew his challenge under 28 U.S.C. § 2241 in this District. Finding the petitioner is challenging the validity of his judgment on grounds of subsequent Supreme Court precedent, I conclude that (1) § 2255 provides his proper avenue of relief and (2) this District is not the proper venue for the petitioner to file such a § 2255 petition. I note, in addition, it is unlikely that he may initiate another § 2255 petition on the instant grounds until the Supreme Court holds retroactive the new case law upon which he purports to rely.

In an effort to assert § 2241 jurisdiction in this court, the petitioner styles his claim as one challenging the execution of his sentence. But his pleadings make clear that it is the validity of the sentence that is at issue

because his contentions are that (a) the holding of the Stogner v. California, 123 S. Ct. 2446 (2003) effectively deprived his RICO conviction of legal sufficiency and (b) that the holding of *Blakely v. Washington*, 124 S Ct. 2531 (2004) effectively requires vacation of his sentence.

Distinctions between § 2241 and § 2255 bear directly on whether this Court has jurisdiction to review the petitioner's claims. I will provide a brief overview of those distinctions before turning to their application in this case.

A § 2241 petition is properly brought in the district court with jurisdiction over the prisoner's custodian; in contrast, a motion under § 2255 must be brought in the sentencing court. *United States v. Barrett*, 178 F.3d 34, 50 n.10 (1st Cir. 1999), *cert denied*, 528 U.S. 1176 (2000). The basis for this distinction is that a writ of habeas corpus under § 2241 is subject to the specific statutory direction that it must be "directed to the person having custody of the person detained." 28 U.S.C. § 2243; *Braden v. 30th Judicial Circ.* 410 U.S. 484, 499-500 (1973); *Vasquez v. Reno*, 233 F.3d 688, 690 (1st Cir. 2000), *cert denied, sub nom., Vasquez v. Ashcroft*, 122 S. Ct. 43 (2001) (court issuing the writ must have personal jurisdiction over the person who holds the petitioner in custody); accord, *Gonzalez v. United States*, 150 F. Supp. 2d 236, 240 (D. Mass. 2001).

A petition for writ of habeas corpus under § 2241 generally challenges the manner, location, or conditions of a sentence's execution. *Gonzalez*, 150 F. Supp. 2d at 240; accord, *Barrett*, 178 F.3d at 50 n. 10 (§ 2241 challenges execution of sentence); *Thompson v. United States*, 536 F. 2d 459, 460 (1st Cir. 1976)(same);

Calvache v. Benov, 183 F. Supp. 2d 124, 126 (D. Mass. 2001). In contrast, a motion to vacate, set aside, or correct a sentence under § 2255 provides the primary means of a collateral attack on the validity of a federal sentence. *See United States v. DiRusso*, 535 F.2d 673, 674-76 (1st Cir. 1976) (Sec. 2255 grants jurisdiction over post-conviction claims attacking the "imposition or illegality of the sentence."); *Rogers v. United States*, 180 F.3d 349, 357 n.15 (1st Cir. 1999), cert. denied, 528 U.S. 1126 (2000) (motion under § 2255 is the exclusive remedy in the sentencing court for any errors occurring at or prior to sentencing, including construction of the sentence itself.'") (quoting *United States v. Flores*, 616 F.2d 840, 842 (5th Cir. 1980)).

Since it appears petitioner's Stogner and Blakely challenges are attacking not the "execution" of the sentence, but the actual underlying conviction and the sentence itself, the proper district in which to make this attack is the Northern District of Illinois, subject to the limitations imposed upon a second or successive petition[1].

While both § 2241 and § 2255 on their face authorize challenges to the legality of a petitioner's continued federal custody, "[i]t is a well-established canon of statutory construction that when two statutes cover the same situation, the more specific statute takes precedence over the more general one." *Coady v. Vaughn*, 251 F.3d 480, 484 (3rd Cir. 2001) (comparing § 2241 and § 2254 habeas challenges) (citing *Edmond v. United States*, 520 U.S. 651, 657 (1997); *Preiser v. Rodriguez*, 411 U.S. 475, 488-89 (1973)). The rationale behind that canon in this setting is that the use of a § 2241 petition rather than a § 2254 or § 2255 motion

would serve to circumvent Congress's intent to restrict the availability of second and successive petitions. *Coady*, 251 F.3d at 484-85.

Here, because petitioner previously filed a § 2255 motion that was denied on the merits in the United States District Court for the Northern District of Illinois, any § 2255 motion filed by him would constitute a "second or successive" petition. *See Norton v. United States*, 119 F. Supp. 2d 43, 44 n. 1 (D. Mass. 2000) (a petition is "second or successive" when a previous habeas petition has been decided on the merits) ; cf. *Sustache-Rivera v. United States*, 221 F.3d 8, 12-13 (1st Cir. 2000). Before a party can file a "second or successive" § 2255 motion, the motion must be certified by the appropriate Court of Appeals, as provided in section § 2244, to contain "(1) newly discovered evidence..., or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255 (emphasis added). It is this latter provision upon which petitioner presumably relies in asserting his Stogner and Blakely challenges.

While I question whether petitioner may properly raise the issue until the Supreme Court has held the rules of Stogner (presumably if extended to RICO limitation periods) and Blakely (presumably if extended to the Federal Sentencing Guidelines) retroactive, see generally *Breese v. Maloney*, 322 F. Supp. 2d 109 (D. Mass. 2004), appeal filed (1st Cir. No. 04-1977), petitioner's efforts to challenge his conviction and sentence under newly decided case law must be raised in the context of a Sec. 2255 motion before the sentencing judge in the district in which he was

sentenced, i.e., the Northern District of Illinois. And, since such a motion would be a "second or successive" motion, petitioner must first seek permission from the United States Court of Appeals for the Seventh Circuit, in order to file.

I recognized that notwithstanding the foregoing discussion finding petitioner's challenge to be more properly asserted as a § 2255 motion, habeas relief under § 2241 "may be appropriate when the remedy provided under section 2255 is inadequate or ineffective." *Garland v. United States of America*, 2004 WL 1593438, at *1-2 (N.D. Tex. 2004), citing *Jeffers v. Chandler*, 253 F.3d 827, 830-31 (5th Cir. 2000), *cert. denied*, 534 U.S. 1001 (2001). A § 2241 petition "may be entertained when the so-called 'savings clause' in § 2255" is satisfied by the petitioner. *Jeffers*, 253 F.3d at 830. That clause states, in relevant part:

An application for a writ of habeas corpus ... shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of detention.

28 U.S.C. § 2255.

Here, attempting to invoke the savings clause, petitioner claims § 2255 will be unavailing because "his inability to file a successive or second 2255 motion makes that remedy inadequate or ineffective to test the legality of detention, thereby entitling him to file a petition for Writ of Habeas Corpus under 29 U.S.C. 2241." However, the case law is clear that the fact

petitioner may be precluded from raising the Stogner and Blakely challenges in a second or successive § 2255 motion does not make that remedy "inadequate or ineffective." *See Garland*, 2004 WL 1593438, at *1 (petitioner precluded from bringing Blake challenge to conviction under 28 U.S.C. § 2241, notwithstanding fact that petitioner may be precluded from raising this claim in a *second or successive § 2255 motion); see also Jeffers, 253 F.3d at 830 ("a prior unsuccessful § 2255 motion, or the inability to meet the AEDPA's second or successive requirement does not make §2255 inadequate or ineffective.").

I recognize further that although "§ 2255 is not `inadequate or ineffective' merely because a prisoner's petition is procedurally barred under that statute," Little v. United States, No. 01-40077RWZ, 2002 WL 1424581; at *2 (D. Mass. July 1, 2002), there are limited circumstances when courts have permitted § 2241 petitions after finding § 2255 inadequate. "The First Circuit has offered no clear standard as to when this prerequisite is satisfied," id., but one circumstance recognized by other courts is when "subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal." *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000).

The petitioner relies on cases following the Supreme Court. decision *Bailey v. United States*, 516 U.S. 137 (1995). In *Bailey*, the Court defined the meaning of firearm "use" in the context of a federal statute to mean "active employment." Id. at 143; *see United States v. Pagan-Ortega*, 372 F.3d 22, 30 n.4 (1st Cir. 2004) (noting

that Bailey has been superseded by statute). For example, in Jones, the court found that the inability of the petitioner to raise a Bailey claim in the initial § 2255 petition permitted the petitioner to raise it in a subsequent § 2241 petition:

[W] e conclude that § 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gate keeping provisions of § 2255 because the new rule is not one of constitutional law.

Jones, 226 F.3d at 333-34; *see Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997) (permitting such a § 2241 petition in the wake of Bailey in "the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions" such as proof of "actual innocence" that could not have been raised effectively before); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997) (permitting the subsequent raising of a Bailey claim under § 2241 to avoid a "complete miscarriage of justice"); see generally Barrett, 178 F.3d at 50-54.

The petitioner claims that Stogner has rendered just such a change to the substantive law when applied to his RICO prosecution. In Stogner, the Supreme Court held that a law which "created a new criminal limitations period that extends the time in which

prosecution is allowed" and "authorized criminal prosecutions that the passage of time had previously barred" violated the Ex Post Facto Clause of the Constitution. Stogner, 123 S.Ct. at 2449. The petitioner here, in essence, contends that Stogner held that statutes of limitations are substantive law and, therefore, prohibits a RICO conviction to be based on predicate acts for which the state statute of limitations has run.

It is not clear on what basis the petitioner claims that Stogner held that statutes of limitations are "substantive" law in the sense relevant here. In any event, Stogner -- by prohibiting the resuscitation of formerly state time-barred charges under state criminal law -- does nothing to call into question the substantive law and limitations period of the federal RICO charge, a charge separate from the predicate acts that form its basis. Unlike in Bailey, where "actions for which the petitioner had been convicted were in fact not criminal at all", here the petitioner was convicted of a federal RICO violation for which the substantive law was left untouched by Stogner. And, to the extent the petitioner argues that RICO violations may not be proven through predicate acts for which the state limitations period has run, he was not precluded from raising that argument before. Indeed, his failure to do so may properly be considered a waiver. In any event, Stogner has not changed the substantive law of RICO violations in a way meaningful here.

In the post-Stogner universe, the Sixth Circuit's earlier description of the relationship between state predicate acts and federal RICO charges still holds true:

[I] t is irrelevant whether these particular defendants could have been charged under Ohio law and imprisoned for more than one year for both conspiracy to murder and murder. This argument has been raised and rejected several times in the context of state statutes of limitations, when the state statute has run on a state crime which is offered as a predicate act for a RICO violation. Courts have held that regardless of the running of the state statute the defendant is still "chargeable" with the state offense within the meaning of 18 U.S.C. § 1961(1)(A). The reference to state law in the statute is simply to define the wrongful conduct, and is not meant to incorporate state procedural law. The Third Circuit noted in *United States v. Frumento*, 563 F.2d 1083, 1087 n.8A (3d Cir.1977), *cert. denied*, 434 U.S. 1072 (1978):

Section 1961 requires, in our view, only that the conduct on which the federal charge is based be typical of the serious crime dealt with by the state statute, not that the particular defendant be "chargeable under State law" at the time of the federal indictment. (emphasis in original)

U.S. v. Licavoli, 725 F.2d 1040, 1046-47 (6th Cir. 1984) (citations omitted).[2]

CONCLUSION

ACCORDINGLY, for the reasons set forth more fully above, respondent's motion to dismiss is ALLOWED.
/s/ Douglas P. Woodlock DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

fn1I note that in an analogous situation I have held that there is no jurisdiction in this Court for a Massachusetts inmate's § 2241 habeas petition based on a challenge under *Apprendi v. New Jersey*, where the petitioner was sentenced in the Northern District of Georgia. *Orozco-Pulido v. United States of America*, Civil Action No. 00-40214-DPW (Memorandum and Order, December 15, 2004, Docket No. 3). See also Doyle v. Winn, Civil Action No. 02-40223-DPW (Memorandum and Order, April 30, 2003, Docket No. 11) (habeas petition attacking sentence itself must be raised in a § 2255 motion rather than a § 2241 habeas petition). Because the petitioner in *Orozco-Pulido* was challenging the validity of the sentence, the proper vehicle to challenge his sentence was through a § 2255 motion in the Northern District of Georgia rather than in the district court in the state of incarceration.

I have also found, more pertinently, that the proper vehicle for a Blakely challenge is through a § 2255 motion rather than a § 2241 habeas petition or some other procedure. *Black v. Winn*, Civil Action No. 04-40233-DPW (Memorandum and Order, Nov. 29, 2004 (Docket No. 4), appeal filed Dec. 31, 2004. See United States v. Yett, 2004 WL 2368216 (5th-Cir. Oct. 21, 2004) (Blake' challenge not cognizable in the context of a motion under 18 U.S.C. §3582 (c) (2)) (not selected for publication) ; *United States v. Stewart*, 2004 WL 2270015, at *1 (D. Me, Oct. 5, 2004)(same; motion made under Fed. R. Crim. P. 35); *United States v. Willis*, 2004 WL 1918893, at *1 (N.D. Ill., July 12, 2004); See also Cuevas v. C.J. DeRosa, 386 F.3d 367, 368 (1st Cir. 2004)("...if the Supreme Court in the future makes Blake' retroactive, the petitioner may at any time attempt to assert a claim by means of a second or

successive § 2255 petition."); *Garland v. United States of America*, 2004 WL 1593438, at *1-2 (N.D. Tex. July 15, 2004)) (petitioner precluded from bringing Blakely challenge to conviction under 28 U.S.C. § 2241, notwithstanding fact petitioner may be precluded from raising this claim in a second or successive § 2255 motion).

fn2It bears noting that Stogner -- unlike Bailey -- was a decision of constitutional law. Therefore, even if it were relevant to this case -- which it is not -- there would be even less reason to find § 2255 inadequate, because the Supreme Court could make the decision retroactive and the petitioner could then move in the Seventh Circuit for leave to file a successive § 2255 motion.